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Cantatore, Francina; Marshall, Brenda

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Navigating the Australian Consumer Law in the digital marketplace: Hazards for commercial entities

Francina Cantatore and Brenda Marshall†*

Currently most Australian businesses make use of the internet and social media as a forum to market their products or services to consumers. Social media, in particular, has transitioned from being a tool for personal communication to a platform for business. The online marketplace is growing rapidly — for example, in 2014 online retail spending by consumers in Australia amounted to \$16.2 billion, and in January 2015 there were 13.8 million Australian Facebook users. In the digital marketplace, there are further opportunities for breaches of consumer protection laws, especially in relation to misleading conduct or statements. This article provides an overview of the application of the Australian Consumer Law (ACL) to e-commerce transactions and examines emerging consumer issues for commercial entities through use of the internet and social media.

Introduction

The internet as a digital marketplace has evolved exponentially in recent years. A 2014 report commissioned by the Federal Government — citing the findings of a 2012 PricewaterhouseCoopers and Frost and Sullivan report — revealed that ‘from 2011 to 2014, Australian online shopping expenditure grew by 17.6% and is projected to reach \$26.9 billion by 2016’.¹ There are many reasons why e-consumerism has increased in popularity, ranging from potential price savings to acquiring products generally prohibited within consumers’ own jurisdictions.²

Although Australian businesses have prospered in this changing environment, there are inherent challenges in trading online. The business sector has generally been poor at developing consumer trust in e-commerce, and is frequently guilty of flagrant breaches of the Australian Consumer Law (ACL),³ largely in their dealings on websites and in social media. Specific areas subject to ongoing scrutiny include the ways in which businesses advertise and sell their products on the internet, and the kinds of promises and

* BA, LLB (Hons), MA, GDLegPrac, PhD, Assistant Professor, Faculty of Law, Bond University.

† BCom (Hons), LLB (Hons), LLM, SJD, Professor, Faculty of Law, Bond University.

¹ Consumer Affairs Australia and New Zealand, *Implementation of the Australian Consumer Law — A Report on Progress IV (2013–2014)*, December 2014, p 13, at <http://consumerlaw.gov.au/files/2015/10/implementation_acl_report_IV.pdf> (accessed 29 February 2016).

² C Scott, ‘Regulatory Innovation and the Online Consumer’ (2004) 26(3–4) *Law & Pol’y* 477 at 479.

³ *Competition and Consumer Law* 2010 (Cth) Sch 2.

claims that accompany online marketing.⁴ This is borne out by the existing case law — where accurate information is not provided to consumers, breaches of the ACL arise and have been addressed by the courts in a robust manner. Moreover, the Acting Chair of the Australian Competition and Consumer Commission (ACCC), Dr Michael Schaper, recently confirmed that ‘truth in advertising and consumer issues in the online market place are both current enforcement priorities’.⁵

This article examines the application of the ACL in relation to businesses trading online and the practical consumer issues they face with regard to the internet and social media. After canvassing issues of consumer vulnerability and business responsibility in connection with e-commerce, the article turns to consider the application of the ACL in relation to online marketing and trading. It then discusses some of the emerging issues arising from advertising and trading on the internet and on social media within the context of relevant case law.

Online marketing: Consumer vulnerability and business responsibility

Most businesses today have a website presence and many of them use the internet and social media as a forum to market their products or services. Social media in particular has transitioned from being a tool for personal communication to a platform for business transactions.

Kariyawasam has referred to the growing trend towards e-commerce as ‘an increasingly pervasive aspect of trade and commerce’,⁶ offering consumers substantial economic, social and utilitarian benefits, such as enhanced consumer choice, improved consumer access to goods and services, and, more generally, greater consumer convenience.⁷ He argues, however, that there are considerable barriers to consumers enjoying these benefits unequivocally. Kariyawasam’s article was written prior to the enactment of the ACL, but he commented on the adequacy of the previous Australian consumer protection regime for online consumer transactions,⁸ which had a number of corresponding provisions to the ACL. In referencing a series of surveys carried out by the ACCC, the latest being in 2007, he noted that of 27 websites canvassed, 22 appeared to have breached their obligations to consumers, especially in relation to misleading and false representations.⁹

These findings resonate with the work of Colin Scott, which addresses the

4 Such promises include those of convenience, achievement, fun and adventure, self-expression and belonging. See N Dholakia et al (Eds), *Global E-Commerce and Online Marketing*, Praeger, 2002, p 115.

5 Australian Competition and Consumer Commission, *Kogan Pays \$32,400 Penalty for Alleged False or Misleading Representations in a Father’s Day Promotion*, Media Release, MR 4/16, 18 January 2016, at <<https://www.accc.gov.au/media-release/kogan-pays-32400-penalty-for-alleged-false-or-misleading-representations-in-a-fathers-day-promotion>> (accessed 29 February 2016).

6 K Kariyawasam, ‘Legal Issues and Challenges in Online Shopping: A Comparative Analysis of Australia and New Zealand’ (2009) 15 *NZBLQ* 178.

7 Ibid, at 179.

8 Trade Practices Act 1974 (Cth).

9 Kariyawasam, above n 6, at 188.

impact of increased internet usage on online consumers.¹⁰ In Scott's view, 'contemporary commercial practices present consumers with informational problems'¹¹ and this is amplified in an online setting because of 'the dependence consumers experience . . . about such central matters as the subject matter of the transaction, and with whom and where they are transacting'.¹²

Svantesson and Clarke have also focused on the heightened vulnerabilities of 'e-consumers' in the e-commerce environment, arguing that consumer law has to play a pivotal role in re-establishing consumer trust in online consumer-business transactions.¹³ In their preferred model of an effective consumer protection framework, one of the key pillars fundamental to safeguarding consumers' needs in the digital environment is that 'consumers must have access to appropriate information' in order to be able to make informed decisions.¹⁴

In a later article,¹⁵ the same authors reaffirm that 'access to appropriate information to be able to decide the advantages and disadvantages of entering into a particular transaction'¹⁶ is critical to how the law protects online consumers.¹⁷ They argue that 'e-consumers are particularly dependent on appropriate information being provided, because such information acts as a substitute for the real-life 'touch-and-feel' that occurs during offline transactions'.¹⁸

The prevalence of misleading or deceptive behaviour on the internet has prompted ongoing government scrutiny of unlawful practices. In October 2015, the ACCC joined a global conglomeration of 34 nations to address e-commerce issues faced by consumers, including online scams. The centrepiece of that campaign is the updated *econsumer.gov* website, launched by the International Consumer Protection and Enforcement Network (ICPEN) on 14 October 2015.¹⁹

Under this scheme, participating agencies may accept consumer complaints, investigate cross-border issues and pursue regulatory or enforcement actions. Interestingly, according to data made available on the ICPEN website, the site recorded 2036 consumer complaints from Australia in 2014, which was the second highest number globally, after 8749 complaints from the USA. Considering the difference in population numbers —

¹⁰ Scott, above n 2, at 477.

¹¹ Ibid.

¹² Ibid.

¹³ D Svantesson and R Clarke, 'A Best Practice Model for E-Consumer Protection' (2010) 26(1) *Computer Law and Security Review* 31.

¹⁴ Ibid, at 33.

¹⁵ D Svantesson and R Clarke, 'The Trade Practices Act: A Hard Act to Follow? Online Consumers and the New Australian Consumer Law Landscape' (2013) 20 *James Cook U L Rev* 85.

¹⁶ Ibid, at 86.

¹⁷ Ibid, at 88.

¹⁸ Ibid, at 85.

¹⁹ Australian Competition and Consumer Commission, *ACCC Joins International Effort to Combat Online Consumer Issues*, 14 October 2015, at <<https://www.accc.gov.au/update/accc-joins-international-effort-to-combat-online-consumer-issues>> (accessed 29 February 2016).

318.9 million in the USA as opposed to 23.13 million in Australia — this may indicate that, either Australian consumers are more vigilant in complaining, or Australians are considerably more dissatisfied with e-commerce transactions.²⁰ However, on the positive side, the statistics show that, in terms of complaints about businesses in a specific country, Australia ranked lower on the list in sixth place, with only 244 complaints recorded with ICPEN in 2014.²¹ Nevertheless, of the top 10 countries listed, Australian businesses ranked higher than those in France, Germany, Canada and Cyprus, which indicates that there may be a need for Australian businesses to be more aware of potential transgressions and to apply more stringent monitoring on their use of the internet. This ranking may also indicate that there is a higher incidence of complaints against overseas businesses by Australian e-consumers, rather than against Australian businesses, hence the high consumer complaint numbers.

Consumers face considerable difficulties when trying to take legal action in the digital marketplace. Of course, one of the key challenges in bringing an action in this arena may be *identification* of the defendant. While consumers may be aware of transacting with a particular internet website, the true ownership of the business may not be as evident. There is some international precedent in relation to disclosing identity in defamation cases, for example, where Yahoo was ordered to disclose the identity of an anonymous commentator in the case of *Keith-Smith v Williams*²² — the first UK blogger to lose a libel action. In Australia, a South Australian District Court ordered Google to disclose to Shane Radbone, a former footballer, the names of people who registered five blogs on the blogger.com network. In that case, Radbone wanted to sue the bloggers for defamation.²³

In a recent landmark Australian decision concerning copyright infringement, Perram J of the Federal Court ordered Australian Internet Service Providers (ISPs) to divulge the names and physical addresses of their customers associated with IP addresses that shared the film *Dallas Buyers Club LLC v iiNet Ltd*, subject to certain restrictions.²⁴ The court found that obligations under the Privacy Act 1988 (Cth) did not constrain the ISPs from disclosing the information under a court order. This decision — although

20 International Consumer Protection and Enforcement Network, *Complaint Trends*, at <<https://www.econsumer.gov/en/News/ComplaintTrend/3#crnt>> (accessed 29 February 2016).

21 The highest number of complaints was against Chinese companies (3647) and second highest against American companies (3405).

22 [2006] EWHC 860 (QB).

23 M Scheikowski and M Godfrey, 'Google Ordered to Identify Bloggers', *Sydney Morning Herald* (online), 16 January 2013, at <<http://www.smh.com.au/technology/technology-news/google-ordered-to-identify-bloggers-20130115-2csh6.html>> (accessed 29 February 2016).

24 *Dallas Buyers Club LLC v iiNet Ltd* (2015) 112 IPR 1; 327 ALR 317; [2015] FCA 317; BC201502294. The court ordered the release of the names and residential addresses of account holders on the following conditions: that the private information be used by Dallas Buyers Club/Voltage only for the purpose of seeking to identify the Infringers, and thereafter negotiating and/or suing the Infringers for damages; that the private information is not to be disclosed to any other third party; and, that Dallas Buyers Club/Voltage provide the court with the letter which they intend to send to account holders in relation to the potential infringement by the account holder for the court's approval.

dealing with copyright infringement — augurs well for parties wanting to seek redress against wrongdoers in the digital marketplace.

The Australian Consumer Law: Scope, application and defences

The case law provides extensive examples of misconduct through online marketing characterised by false or misleading information provided to consumers. These circumstances typically result in breaches of the consumer protection provisions of the ACL. Importantly, the ACL is technology neutral — so it applies equally to ‘brick-and-mortar businesses’ and online businesses. For this legislation to be relevant, it is sufficient that the business is supplying goods or services to customers located in Australia.

Relevant sections of the ACL that arise in relation to these matters include:

Section 18 Misleading or deceptive conduct

A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 29 False or misleading representations about goods or services

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

- (a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use;
- (b) make a false or misleading representation that services are of a particular standard, quality, value, or grade;
- (c) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services;
- (g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits;
- (i) make a false or misleading representation with respect to the price of goods or services;
- (k) make a false or misleading representation concerning the place of origin of goods

Section 33 Misleading conduct as to the nature etc. of goods

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

Section 34 Misleading conduct as to the nature etc. of services

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services.

As recently acknowledged by the High Court in *Google Inc v Australian Competition and Consumer Commission*,²⁵ a number of ‘well-established propositions’ underpin the application of the above provisions:

- in considering the effect of allegedly misleading conduct on a class of persons such as consumers who may range from the gullible to the astute, the court must consider whether the ‘ordinary’ or ‘reasonable’ members of that class would be misled;
- conduct causing confusion and wonderment is not necessarily co-extensive with misleading conduct;
- there is no requirement that the impugned conduct must be intended to mislead — a contravention of the ACL’s misleading conduct provisions can be established even though a party acted reasonably and honestly;
- the words ‘likely to mislead or deceive’ in s 18 make it clear that it is not necessary to demonstrate actual deception to establish a contravention of that provision; and
- in relation to intermediaries or agents, the question whether a party which publishes, communicates or passes on the misleading representations of another has itself engaged in misleading or deceptive conduct will depend on whether it would appear to ordinary and reasonable members of the relevant class that the party has adopted or endorsed that representation.²⁶

The ACL is not prescriptive of the evidence required to substantiate claims of misleading or deceptive conduct. Typically, questions of proof in this area will be resolved by the application of the general principles of the law of evidence and ‘on the balance of probabilities’. Whether a particular representation will be held to be ‘misleading or deceptive’ will always depend on the circumstances of the case. While expert evidence may be adduced as to the truth or falsity of the representation, and the impact of the representation on its target audience, the courts have made it clear that the question is ultimately one ‘for the tribunal of fact and . . . not . . . for any witness to decide’.²⁷

On the facts of the *Google Inc v Australian Competition and Consumer Commission*,²⁸ the High Court held that sponsored advertisements appearing on the Google search engine were not representations made by Google. This decision followed from proceedings brought by the ACCC against Google in 2007 under s 52 of the Trade Practices Act 1974 (Cth) (TPA) (now s 18 of the ACL). The ACCC alleged that Google had engaged in misleading or deceptive conduct by publishing certain advertisements, being the ‘sponsored links’.²⁹

25 (2013) 249 CLR 435; 99 IPR 197; [2013] HCA 1; BC201300295.

26 See *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435; 99 IPR 197; [2013] HCA 1; BC201300295 at [6]–[9] per French CJ, Crennan and Keifel JJ. Although the High Court’s primary focus in this case was on s 52 of the TPA — now s 18 of the ACL — these propositions can be extrapolated to the other misleading conduct/representation provisions in that legislation.

27 *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348 at 387; 111 ALR 577 at 617; 25 IPR 65 at 105; BC9203904.

28 (2013) 249 CLR 435; 99 IPR 197; [2013] HCA 1; BC201300295.

29 *Ibid.*, at [53] per French CJ, Crennan and Keifel JJ.

In finding in favour of Google, the High Court determined that reasonable members of the public would have understood the sponsored links to be advertisements made and paid for by the advertisers, and that Google had not adopted the representations made in them.³⁰

The court reasoned that '(t)he display of sponsored links ... can be described as Google's response to a user's request for information does not make Google the maker, author, creator or originator of the information in a sponsored link'.³¹ In coming to this conclusion, the court applied the 1985 judgment in *Yorke v Lucas*,³² in which it was noted that where information is merely passed on 'for what it is worth', and the party doing so expressly or impliedly disclaims any belief in the truth or falsity of the information, that party cannot be said to have engaged in misleading or deceptive conduct.³³

Limited defences are available under the ACL and currently there is no reported judgment on the use of the 'publisher's defence' (s 251 of the ACL) or the 'information provider's exemption' (s 19 of the ACL) in relation to the internet or social media. Broadly speaking, the s 251 defence applies to publishers of advertisements where it is shown that the publisher is in the business of publishing or arranging for the publication of advertisements and that it received the relevant advertisement for publication in the ordinary course of business and did not know, and had no reason to suspect, that its publication would amount to misleading conduct. Section 19 exempts 'information providers' — in effect, the news media — from falling within the scope of the misleading conduct provisions of the ACL when they publish or broadcast items of news or comment.

In *Bond v Barry*,³⁴ journalist Paul Barry was able to rely on the equivalent of the s 19 defence (s 65A TPA), although he was a freelance journalist, in respect of a newspaper article he had authored. Under the headline 'Bond, the \$1 billion man', Barry's article commented on Alan Bond's dealings with a diamond mining company in Africa. Bond alleged that the article was misleading or deceptive, but the Federal Court of Australia upheld Barry's claim to the protection of the information provider's exemption, construing the provision broadly.³⁵

There was no scope for latitude in the case of *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd*,³⁶ however. There, Channel 7's *Today Tonight* show broadcast misleading representations about the benefits of the services offered by a property investment training program, titled 'Wildly Wealthy Women'. The High Court of Australia held that the 'safe-harbour' provision did not apply to situations in which a media outlet, pursuant to an arrangement with a supplier of goods or services, published and made representations of a misleading or deceptive nature in relation to those goods or services.³⁷

30 Ibid, at [70] per French CJ, Crennan and Keifel JJ.

31 Ibid, at [69] per French CJ, Crennan and Keifel JJ.

32 (1985) 158 CLR 661; 61 ALR 307; 59 ALJR 776; BC8501069.

33 Ibid, at 666 per Mason ACJ, Wilson, Deane and Dawson JJ.

34 (2007) 73 IPR 490; ATPR 42–187; [2007] FCA 1484; BC200708139.

35 Ibid, at [42]–[43] per French J.

36 (2009) 239 CLR 305; 80 IPR 497; [2009] HCA 19; BC200903238.

37 Ibid, at [9] per French CJ and Kiefel J.

In the absence of reported judgments on the use of the ‘publisher’s defence’ or ‘information provider’s exemption’ in relation to the internet or social media, it remains to be seen whether the courts will interpret these provisions broadly (as in *Barry’s* case), or apply a stricter interpretation of the law due to the far-reaching effects of internet publication. In particular, it can be argued that the courts will be loath to allow extenuations in respect of internet or social media publications or broadcasts of news items or comments, where the publisher failed to act reasonably and honestly.

Emerging consumer issues on the internet and social media

Websites

An area of trading which has seen a number of infringements on the internet in recent years are group discount buying sites. Online group buying websites, often referred to as ‘daily deals’ or ‘deal of the day’ sites, sell vouchers for heavily discounted goods or services.³⁸ The ACCC has taken action against a few operators where misleading claims or promises were made to consumers.

The most recent case was against LivingSocial (previously called Jump On It),³⁹ in which the company was charged with breaching ss 18, 29 and 23 of the ACL. The ACCC alleged that LivingSocial had engaged in misleading and deceptive conduct and made false representations on its website about consumers’ refund rights. In addition, the ACCC said that LivingSocial had made false or misleading representations about the price of certain deals. LivingSocial acknowledged that the representations may have contravened ACL and gave an undertaking to do various things, including making refunds to some of their customers, making changes to its website and sending out corrective notices.⁴⁰

In December 2013, the Federal Court of Australia ordered Scoopon to pay penalties of \$1 million,⁴¹ for making false or misleading representations to consumers about their refund rights, and the price of goods advertised in relation to some of its deals; and to businesses that there was no cost or risk involved in running a deal with Scoopon, when this was not the case.⁴² The ACCC also instituted proceedings in 2014 against Spreets for misleading and

³⁸ See, eg, *Scoopon*, at <https://www.scoopon.com.au/?utm_source=google&utm_medium=cpc&utm_term=daily%20deals&utm_campaign=gnr_australia_deals_phrase&gclid=CJyu7POP6soCFQx9vQodhSQPEw> (accessed 29 February 2016).

³⁹ In this case, LivingSocial agreed to a court enforceable undertaking dated 18 December 2014, at <<http://registers.accc.gov.au/content/index.phtml/itemId/1183806>> (accessed 29 February 2016).

⁴⁰ Ibid.

⁴¹ *Australian Competition and Consumer Commission v Scoopon Pty Ltd* [2014] FCA 820; BC201406258 at [11] per Greenwood J.

⁴² See Australian Competition and Consumer Commission, *Scoopon to Pay \$1 Million for Misleading Both Businesses and Consumers*, Media Release, MR 305/13, 17 December 2013, at <<http://www.accc.gov.au/media-release/scoopon-to-pay-1-million-for-misleading-both-businesses-and-consumers>> (accessed 29 February 2016).

deceptive conduct and for making false or misleading representations.⁴³ For example, while negotiating a 'breakfast for two' offer in 2011, Spreets allegedly told a restaurant only two or three tables needed to be allocated on Fridays. More than 250 consumers bought the deal, without being told about the limitation. Another allegation was that they failed to disclose additional fees for skydiving deals. The Federal Court of Australia found the Melbourne-based firm had made false or misleading claims about the price of some deals, how readily customers could redeem vouchers, and their rights to a refund, imposing a fine of \$600,000 on Spreets.⁴⁴

In an unrelated 2013 case dealing with passing off, *REA Group Ltd v Real Estate 1 Ltd*,⁴⁵ Bromberg J acknowledged the changing face of consumer behaviour:

Scouring the real estate classifieds of a metropolitan daily newspaper used to be an essential Saturday morning activity for those interested in buying or renting real estate. With the advent and increasing popularity of the internet, consumer behaviour has been greatly altered and perhaps no more so than in relation to the purchase or rental of real estate.⁴⁶

The case concerned the operation of internet property portals, where real estate agents list and consumers view residential or commercial property. The applicant was registered as the owner of both the Real Estate Australia (REA) residential property portal 'realestate.com.au' and the REA commercial property portal 'realcommercial.com.au', with similar associated brand elements, trade marks and promotion. The dispute arose because the respondent, Real Estate 1, used domain names 'realestate1.com.au' and 'realcommercial1.com.au' which REA argued were substantially similar to its registered names. This argument was raised with respect to both the names and trade indicia. REA alleged Real Estate 1 was in breach of both ss 52 (misleading or deceptive conduct) and 53 (false or misleading representations) of the TPA, and brought an additional claim for passing off. Bromberg J dismissed REA's claim entirely on the basis that REA failed to establish that 'a not insubstantial number of 'ordinary' or 'reasonable' persons in the class have been or were likely to have been misled or deceived'.⁴⁷ This decision turned on the requirement of parties claiming under s 18 or s 29 of the ACL (and previously s 52 or s 53 of the TPA) to show that persons have been or were likely to have been misled, and how this may become an issue when dealing with the 'faceless' audience of the internet.

In 2014, the ACCC instituted proceedings against A Whistle & Co (1979) Pty Ltd, the franchisor of Electrodry Carpet Cleaning, in the Federal Court of Australia, alleging that it was involved in the posting of fake online testimonials.⁴⁸ The ACCC alleged that Electrodry had made false or misleading representations through a contractor, acting as Electrodry's agent

43 *Australian Competition and Consumer Commission v Spreets Pty Ltd* [2015] FCA 382; BC201406258.

44 *Ibid*, at [153] per Collier J.

45 (2013) 217 FCR 327; 102 IPR 1; [2013] FCA 559; BC201302952.

46 *Ibid*, at [1] per Bromberg J.

47 *Ibid*, at [190] per Bromberg J.

48 *Australian Competition and Consumer Commission v A Whistle & Co (1979) Pty Ltd* [2015] FCA 1447; BC201512633.

or at its direction, by posting fake testimonials relating to Electrodry Carpet Cleaning on the internet; and that it had ‘induced or attempted to induce its franchisees to make false or misleading representations by posting fake testimonials on the internet’.⁴⁹ It was alleged that the testimonials were written and posted by people associated with, or contracted to, Electrodry, and not by its genuine clients as the testimonials implied. The ACCC is seeking declarations, penalties, injunctions and corrective notices and the case is ongoing.⁵⁰

In *Australian Competition and Consumer Commission v P & N Pty Ltd*,⁵¹ a solar panel supplier falsely represented that written and video testimonials published on its company website were given by customers, amounting to a clear breach of s 29(1)(e) of the ACL.⁵² The company had also promoted the solar panels it supplied by use of the words ‘Australian Solar Panel’. The Federal Court of Australia found this represented that the solar panels were made in Australia, when in fact they were made in China, amounting to a further contravention of s 29(1)(k) of the ACL.⁵³

Online retailer, Kogan.Com Pty Ltd (Kogan), recently paid penalties totalling \$32,400 after the ACCC issued three infringement notices in response to the way that Kogan advertised the price of three computer monitors as part of a Father’s Day promotion in 2015. (The payment of a penalty specified in an infringement notice is not an admission of a contravention of the ACL. The ACCC can issue an infringement notice where it has reasonable grounds to believe a person has contravened certain consumer protection laws.)

Kogan advertised on its eBay store that consumers would receive a 20% discount on three types of computer monitors if they were purchased between 24 and 29 August 2015. However, at the start of the sale period, Kogan increased the prices of these computer monitors. This meant that consumers received a 20% discount on the newly raised prices, but only a 9% discount on the original prices. Then, shortly after the sale ended, the advertised prices of the three computer monitors returned to the lower prices which had been offered before the promotion commenced.

False or misleading representations about the price of goods or services are prohibited under s 29(1)(i) of the ACL. If a price is represented as being discounted, then it must represent a true reduction in the retail price. This applies to ‘was/now’ prices, strike-through prices and comparisons with the RRP, as well as percentage discounts. Thus, retailers should not increase the ‘normal’ price of goods or services during a period when they are advertising a percentage discount off the normal price, such as a ‘20% off’ sale. This misleads consumers into believing that they are receiving a larger percentage discount than they actually are.

49 Australian Competition and Consumer Commission, *ACCC Takes Action Against Electrodry Alleging Fake Testimonials or Reviews*, Media Release, MR 170/14, 2 July 2014, at <<https://www.accc.gov.au/media-release/accc-takes-action-against-electrodry-alleging-fake-testimonials-or-reviews>> (accessed 29 February 2016).

50 Ibid.

51 [2014] FCA 6; BC201400060.

52 Ibid, at [3] per Besanko J.

53 Ibid, at [1] per Besanko J.

The ACCC has long maintained a particular focus on representations about health products and services. In *Australian Competition Consumer Commission v Purple Harmony Plates Pty Ltd*,⁵⁴ the ACCC argued that representations made on the company's website and in certain publications in relation to a product called 'Purple Harmony plates' suggested the product had performance characteristics it did not possess and were misleading or deceptive or likely to mislead or deceive,⁵⁵ contrary to ss 52 and 53(c) of the TPA.⁵⁶ The product marketed having many and varied therapeutic benefits, including: negating the effects of electromagnetic radiation; accelerating healing; decreasing stress levels; calming the mood; strengthening the immune system; and treating cuts, burns, aches and pains.⁵⁷

The ACCC relied upon s 51A of the TPA,⁵⁸ and argued that the representations were as to future matters that could not be substantiated.⁵⁹ This provision placed the burden of proof upon a party who had made a representation about a future matter to demonstrate that it had reasonable grounds for making the representation, otherwise the representations would be deemed to be misleading.

The FCA held that the defendant had: represented the products possessed the performance characteristics claimed; these representations made claims as to future matters; and, the representations claimed that a person who purchased the product would derive the stated benefits from the product.⁶⁰ The defendant did not provide any substantial evidence to support the assertions made that would address the question of whether the company had any reasonable grounds for making the representations.⁶¹ Accordingly, the representations were deemed to be misleading.⁶² The court ordered injunctive relief against the respondents making these representations and required refunds to customers and corrective advertisement.⁶³

In the 2014 case *Australian Competition Consumer Commission v Homeopathy Plus! Australia Pty Ltd*,⁶⁴ the Federal Court of Australia considered the implications of posting false or misleading articles on a website. Homeopathy Plus! Australia Pty Ltd uploaded three articles relating to homeopathic products on their website, which were accessible to all internet users.⁶⁵ The three articles contained a number of allegations to the effect that the whooping cough vaccine was largely ineffective and outdated. The court held these representations amounted to contraventions of ss 18

54 [2001] FCA 1062; BC200104454.

55 Ibid, at [10] per Goldberg J.

56 Now ss 18 and 29(1)(g) of the ACL.

57 *Australian Competition and Consumer Commission v Purple Harmony Plates Pty Ltd* [2001] FCA 162; BC200104454 at [17] per Goldberg J.

58 Now s 4(1) of the ACL.

59 *Australian Competition and Consumer Commission v Purple Harmony Plates Pty Ltd* [2001] FCA 162; BC200104454 at [11] per Goldberg J.

60 Ibid, at [21]–[22] per Goldberg J.

61 Ibid, at [20] per Goldberg J.

62 Ibid, at [22] per Goldberg J.

63 Ibid, at [31] per Goldberg J.

64 (2014) 146 ALD 278; [2014] FCA 1412; BC201419409.

65 Although access to one article required membership to the site, 'membership was open to any member of the public with access being free of charge'.

and 29 of the ACL.⁶⁶ Despite a separate disclaimer that the information on the website was ‘for educational purposes only’ as well as a disclaimer in the terms and conditions of the website, Perry J held that these disclaimers were not sufficient to ‘erase the false, misleading or deceptive nature of the information’ contained within the articles.⁶⁷ This approach signified a strict application of the ACL provisions by the court, despite the inclusion of multiple disclaimers on a website.

Facebook and blog posts by third parties

In the above cases there was clear evidence of misconduct and breaches of the ACL. However, in some instances there exists a degree of uncertainty about liability for what may be perceived as unlawful conduct. This section further examines some of the emerging issues in this area of the law and how they have been dealt with in the courts, in particular:

- What is the liability of owners of a Facebook page for postings on their page — is the owner of a Facebook page liable for misleading posts on their page by third parties?
- When is a comment made online misleading or deceptive and when is it merely an expression of opinion of the writer? The blurring line between information and opinion raises some questions under the ACL.

With regard to comments or posts by third parties on a Facebook page or website, there are now clear expectation guidelines provided by the ACCC.⁶⁸ Relying on Australian precedent, the ACCC website warns that parties can be held responsible for posts or public comments made by others on their social media pages which are false or likely to mislead or deceive consumers, if they know the content to be untrue, or if they are unsure of the truth and allow the posts to remain.⁶⁹

In the landmark 2011 decision of *ACCC v Allergy Pathway Pty Ltd (No 2)*,⁷⁰ Allergy Pathway had made representations on their website and in advertisements about their ability to cure allergies. In a previous case against the company in 2009,⁷¹ the Federal Court of Australia found that statements made on social media amounted to ‘conduct’ under the ACL and held that the representations were misleading and deceptive.⁷² In that case, Allergy Pathway was required to publish corrective notices, and undertake not to engage in similar behaviour for 3 years. Subsequently, after the first case testimonials were posted on the company’s Twitter and Facebook pages endorsing the company’s products — one statement said Allergy Pathway

66 *Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Ltd* (2014) 146 ALD 278; [2014] FCA 1412; BC201419409 at [318] per Perry J.

67 *Ibid*, at [284] per Perry J.

68 See Australian Competition and Consumer Commission, *Social Media*, at <<https://www.accc.gov.au/business/advertising-promoting-your-business/social-media#dont-allow-others-to-make-misleading-claims-in-comments>> (accessed 29 February 2016).

69 *Ibid*.

70 (2011) 192 FCR 34; [2011] FCA 74; BC201100491.

71 *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd* [2009] FCA 960; BC200907920.

72 *Ibid*, at [5] per Finkelstein J.

could ‘cure or eliminate virtually all allergies or allergic reactions’ and that it was safe for people to have contact with their allergens after treatments, when it was not.⁷³ The court found that third party posts amounted to a breach of the undertaking and found the directors guilty of contempt of court, as they knew about the statements but did not remove them. However, the decision did not stipulate what a reasonable timeframe for removing third party comments would be, and this issue has not yet been addressed by the courts.

The ACCC webpage provides guidance in this regard. It states that the amount of time one needs to spend monitoring one’s social media pages depends on two key factors, namely the size of one’s company and the number of fans or followers one has.⁷⁴ Significantly, the ACCC points out that businesses should keep in mind ‘that social media operates 24 hours a day, seven days a week’.⁷⁵ In an informal statement the ACCC has indicated that misleading posts should be removed within 24 hours.⁷⁶

The following two examples are provided on the ACCC website:

Company A has 300 staff. As larger companies usually have sufficient resources and sophisticated systems, the ACCC would expect A to become aware of false, misleading or deceptive posts on its Facebook page soon after they are posted and to act promptly to remove them; and

Company B has only 10 staff but more than 50,000 Facebook fans. Given the number of people who could be misled by an incorrect post on XYZ’s Facebook page, the ACCC would expect XYZ to devote adequate resources to monitoring its Facebook page and to remove any false, misleading or deceptive posts soon after they are posted.⁷⁷

Although these examples provide an indication of the ACCC’s expectations, they are not specific and in practice it will presumably depend on the circumstances of each case.

In another recent case dealing with posts on a blog, *Fletcher v Nextra Australia Pty Ltd*,⁷⁸ Middleton, McKerracher and Davies JJ heard an appeal of a decision that found an internet blog criticising the contents of a flyer distributed by Nextra Australia — a competitor of the appellant — was misleading and deceptive conduct under s 18 of the ACL. The appellant argued that the conduct did not occur in ‘trade or commerce’ because the comments had been published in a blog forum, and that ‘industry participants may from time to time act as commentators on industry affairs without those comments being in trade or commerce’.⁷⁹ However, the court dismissed the appeal and found that content published on an online blog could amount to conduct that occurred in ‘trade or commerce’ for the purpose of s 18 of the ACL.⁸⁰ However, this conclusion was reached in view of the content of the blog and the broader context of Mr Fletcher and his position as ‘an active

73 Ibid, at [2] per Finkelstein J.

74 See Australian Competition and Consumer Commission, above n 68.

75 Ibid.

76 Ibid.

77 Ibid.

78 [2015] FCAFC 52; BC201504528 .

79 Ibid, at [55] per Middleton, McKerracher and Davies JJ.

80 Ibid, at [58] per Middleton, McKerracher and Davies JJ.

participant in the newspaper franchise industry' who did not use the blog merely as a forum for industry discussion, information and debate, but who 'intended his conduct to have an impact on trading or commercial activities'.⁸¹ This judgment unequivocally confirmed that organisations posting blogs relating to their industry are subject to the application of the ACL.

The question, 'When is a comment made online misleading or deceptive and when is it merely an expression of opinion of the writer?' was considered in the 2012 case of *Seafolly Pty Ltd v Madden*.⁸² Usually, a case will turn on whether the representation was information provided to the consumer — which they relied on — or merely someone's personal opinion. In *Seafolly Pty Ltd v Madden*,⁸³ the Federal Court of Australia had to decide whether comments made by the respondent, Ms Madden, on her Facebook page were misleading and deceptive or merely an expression of the writer's opinion. The court applied existing case law to a social media context and confirmed that an opinion made recklessly could amount to misleading or deceptive conduct.⁸⁴

The respondent, Ms Madden, who was a swimwear designer, made representations on her Facebook page which suggested Seafolly had copied some of her designs. She posted some photos under the heading 'The sincerest form of flattery?' implying that Seafolly had copied her designs. She also posted some comments on her White Sands Australia Swimwear Facebook page, which had over 3500 friends. Seafolly denied the allegations and took action against her for misleading and deceptive conduct. The question was whether the language employed by Ms Madden was such that persons viewing her statements would be deceived or misled into believing that Seafolly had copied her designs. She argued that she was merely expressing an opinion about the similarities between her garments and those of Seafolly. The court held that her statements would not have been understood as mere expressions of her opinion, and even if they did, she was reckless in forming them, as she had not made a serious attempt to ascertain the true position.⁸⁵

Consequently, following this judgment, even if comments amount to an expression of the author's opinion, if the comments are false and no genuine effort is made to establish the truth, the court will treat them as misleading or deceptive.

Conclusion

In enforcing the ACL in the digital sphere, it is likely that more reliance will be placed on 'soft' regulation and self-regulation, such as the ACCC social media guidelines.⁸⁶ 'Soft' regulation involves regulation by providers or industry organisations. Facebook, eg, provides advertising guidelines⁸⁷ regarding issues such as 'prohibited content' and 'restricted content'. Failure

81 Ibid, at [57] per Middleton, McKerracher and Davies JJ.

82 (2012) 297 ALR 337; 98 IPR 389; [2012] FCA 1346; BC201209325.

83 Ibid.

84 Ibid, at [68] per Tracey J.

85 Ibid.

86 See Australian Competition and Consumer Commission, above n 68.

87 See <<https://www.facebook.com/policies/ads/>> (accessed 29 February 2016).

to comply may result in a variety of consequences, including the cancellation of advertisements and termination of users' accounts. Users are bound by a 'Statement of Rights and Responsibilities' which regulates their relationship with Facebook.⁸⁸

Especially in light of cost considerations, it is expensive and onerous for consumers to commence litigation on issues such as misleading and deceptive conduct. Considering the already high cost of litigating locally, taking legal action against an overseas company may be prohibitive and completely out of reach for most individuals. However, the ICPEN econsumer.gov website,⁸⁹ provides consumers with a welcome avenue — albeit limited to members of the initiative — of redress against foreign companies. On an international level, the Organisation for Economic Co-operation and Development also plays a key role in regulation, with, eg, the *Guidelines for Consumer Protection in the Context of Electronic Commerce* calling on businesses to act 'in accordance with fair business, advertising and marketing practices'.⁹⁰

Given the public nature of social media, there is a tendency for users to share and alert others if they come across scams or misleading conduct. Thus, in the digital marketplace word of mouth could be an important factor in addressing misleading and deceptive conduct. Social media sites, such as Facebook, also have a vested interest in managing the content on their site for reliability and accuracy, and generally have internal mechanisms to address complaints.⁹¹ However, as noted, this does not absolve commercial entities from responsibility for postings on their sites/pages, and failure to adequately monitor content can result in prosecution by the ACCC. Clearly, there is a need for Australian businesses to ensure compliance with the ACL and ACCC guidelines, by educating and training their staff, by monitoring their online presence carefully, and by being 'flexible and responsive to new issues as they emerge'.⁹²

88 See <<https://www.facebook.com/legal/terms>> (accessed 29 February 2016).

89 See the ICPEN website at <<https://www.econsumer.gov/#crnt>> (accessed 29 February 2016).

90 Scott, above n 2, at 489.

91 See, eg, Facebook policies on applicable standards, at <<https://www.facebook.com/communitystandards>> (accessed 29 February 2016).

92 Bruce Billson, 'The Importance of a Strong Consumer Law in the Digital Age', speech delivered at the 2014 National Consumer Congress, Sydney, 13 March 2014, at <<http://bfb.ministers.treasury.gov.au/speech/005-2014/>> (accessed 29 February 2016).